Against the judgment and order of conviction and sentence dated 11.10.2007/12.10.2007 passed by Sri Arun Kumar Singh, Additional Sessions Judge, Fast Track Court No.V Saharsa in Sessions Case No. 109 of 2006.

DEATH REFERENCE NO. 15 OF 2007

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-WITH-

CRIMINAL APPEAL NO. 1374 OF 2007

PRAMOD SAH, Son of late Kamal Sah, resident of village-Araha, Police Station- Saur Bazar, District- Saharsa ……..Appellant

-VERSUS-

THE STATE OF BIHAR

For the appellant: Mr. Ashutosh Kumar
Mr. Chandra Mohan Jha.

For the State : Mr. Lala Kailash Bihari Prasad, Sr. Advocate

Present

The Hon'ble Justice Mrs. Mridula Mishra
The Hon'ble Mr. Justice Syed Md. Mahfooz Alam

JUDGMENT

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Mrs. Mridula Mishra & S.M.M. Alam,JJ. This Death Reference as well as Criminal Appeal No. 1374 of 2007 relates to judgment of conviction and sentence dated 11.10.2007/12.10.2007 passed by Sri Arun Kumar Singh, Additional Sessions Judge, Fast Track Court, No.-V, Saharsa in Sessions Case No. 109 of 2006 . By the impugned judgment and order, sole appellant, Pramod Sah has been convicted for offence u/S 302 of the Indian Penal Code and awarded death sentence.

The F.I.R. of Saur Bazar P.S. Case No. 21 of 2006 was registered for offence u/S 302/34 of the Indian Penal Code on the basis of fardbeyan of Kishun Sah (P.W. 7) on 23.01.2006 at 8.00 p.m. at village, Arraha, P.S. Saur Bazar in the district of Saharsa. Informant is brother of the deceased, Pramila Devi @ Musani Devi who was

informed by one, Bindeshwar Sah (P.W. 8) regarding murder of his sister , Pramila Devi @ Musani Devi.

The case of prosecution is that on 23.01.2006 at about 5.00 p.m. , the informant was informed telephonically by Bindeshwar Sah regarding murder of his sister. On receiving such information, he travelled 14 kilometres distance and came at village, Arraha, at about 6.00 p.m. He found deadbody of his sister at the village road near house of Arun Sah. His niece, Gudiya Kumari, daughter of the deceased, aged about 9 years informed him that due to a dispute of taking away bundles of straws by Mamta , wife of Pramod Sah , altercation took place and Musani Devi was assaulted by Pramod Sah with dagger. She received grievous injuries on her person and succumbed to death. From the F.I.R. it is also disclosed that the deceased Pramila Devi @ Musani Devi was married with Ram Jeewan Sah about 25 years ago but for 10 years , she was deserted by her husband and living along with her two daughters in the village. Her husband had left her and was residing with his second wife at Dhanbad.

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Fardbeyan of the informant was recorded by Anil Kumar “Yadvendu” , Officer-in-charge, Saur Bazar P.S. (P.W.10), formal F.I.R. was registered on the basis of this fardbeyan. The case was investigated by P.W. 10 and charge sheet was submitted against Pramod Sah (appellant) and his wife Mamta Devi. After cognizance, the case was committed to the court of sessions and finally, by the impugned judgment, the appellant has been convicted and sentenced to death.

The prosecution has examined altogether 13 witnesses. Out of 13 witnesses; P.Ws. 1 & 13 namely, Jaykant Jha and Madan Rai respectively, are formal witnesses. P.Ws. 2, 3, 4, 5, 6, 7, and 8, namely, jaikant Sah, Satya Narayan Yadav, Sadanand Paswan, Md. Aftab Alam, Suman Sah, Kishun Prasad and Bindeshwar Sah have been declared hostile by the prosecution as they did not support the case of prosecution. P.W. 9, Dr. Sachidanand Rai, posted as Civil Assistant Surgeon at Sadar hospital, Saharsa conducted post-mortem on the dead body of the deceased. He submitted post-mortem report. P.W. 7 is the informant who is brother of the deceased but not an eye witness to the occurrence. Sole eye witness to the occurrence is, P.W. 12, Gudiya Kumari who is younger daughter of the deceased, aged about 9 years. Entire prosecution case revolves around the evidence of solitary eye witness, P.W. 12.

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P.W. 7, Kishun Prasad Sah has stated in examination-in-chief of his deposition that on the basis of his fardbeyan , F.I.R. was registered . It was read over to him and finding it correct, he put his signature on it but this statement has completely been denied in his cross-examination where he has stated that the F.I.R. was not registered on the basis of his fardbeyan rather it was the villagers on whose statement, the F.I.R. was registered. He only put his signature on the F.I.R. and the contents of the F.I.R. were not read over to him by the Officer-in-charge who recorded the statement. In sum and substance, the evidence of P.W. 7 , the informant is that the statement made in the F.I.R. on the basis of which , the criminal proceeding has been initiated , is not his

fardbeyan. He only knew about the occurrence as per the information given to him by the villagers.

Counsel for the appellant has submitted that this is a peculiar case in which the prosecution has not brought on record to show that injuries which have been found on the person of the deceased were caused by the weapon which is said to be the weapon as per the post-mortem report. The I.O. (P.W.10) in his evidence has stated that he seized the blood stained knife but did not send it for chemical examination or for finding it out whether the fingerprints present on the knife tallied with the finger-prints of the accused/appellant. He did not seize the blood stained soil though P.W. 9 Dr. Sachidanand Rai who conducted post-mortem, has specifically stated in his evidence that in case of injury as found on the person of deceased there will be profused bleeding. Suggestion was also given to the I.O. that in fact, the occurrence had not taken place at the alleged place of occurrence rather the occurrence took place in some other manner at some other place and only the dead body was kept at the place of occurrence; which was denied by the I.O. It has also been submitted by the appellant's counsel that all independent eye witnesses including the Ex-Sarpanch of the Gram Panchayat and other respectable persons of the villager who were named as charge-sheet witnesses refused to support the case of prosecution. None of them have supported the prosecution case; that the appellant repeatedly stabbed the deceased. In the circumstances, now the question arises whether conviction of the appellant can sustain on the basis of solitary evidence of a minor witness who is none-other than the daughter of

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the deceased. It has also been stated that necessary pre-caution for placing reliance on the evidence of a minor witness or a child witness have also not been taken by the concerned court.

In the given circumstances, the only relevant evidence is the evidence of P.W. 12. She has stated in her evidence that on the date of occurrence, some altercation took place in between her mother and Mamta Devi for bundles of straw. Mamta Devi had taken away three bundles of straw of his mother in the afternoon itself. Her mother in the evening went to make complaint and then only she was repeatedly stabbed by Pramod Sah though no alarm was raised by her. She has also stated that at the time of occurrence, several persons were present but none of them tried to resolve the dispute. P.W. 12 has stated in paragraph 3 of her evidence that her mother was stabbed five times by dagger. She has stated that all through the occurrence, she was present at the place of occurrence and has witnessed the entire occurrence. Though counsel for the appellant has tried to emphasize that there are chances of a minor witness be influenced and tutored but on consideration of the evidence of P.W. 12, it transpires that neither any suggestion was given to this witness that she has been tutored nor there is any evidence on record to show that she is not the eye witness and under any influence, she has deposed in the case. Further we find that the post-mortem report and the evidence of Dr. Sachidanand Rai (P.W.9) corroborate the evidence of P.W. 12 regarding the number of injuries found on the person of the deceased. The Doctor has found five injuries caused by knife on the person of the

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deceased and P.W. 12 has mentioned about exactly same number of assault made on the person of her mother by the accused/appellant.

Considering the evidence, there is nothing to hold that the evidence of P.W. 12 is either tutored or untrustworthy. Only test for accepting a solitary eye witness is that it must be wholly trustworthy and on that basis, we find that the evidence of P.W. 12 is tenable.

Now the question which arises for consideration, whether the act of the appellant or the evidence which has been brought on record by prosecution, is sufficient to hold that the offence committed by the appellant comes within the purview of offence u/S 302 of the Indian Penal Code or it comes within any exception u/S 300 of the Indian Penal Code . The evidence which is on record indicates that the dispute in between the deceased and wife of this appellant , Pramod Sah was on a minor issue such as, taking away bundles of straw. Evidence shows that even that dispute had subsidided in the afternoon itself. Thereafter, the deceased herself went to re-agitate her grievance which resulted into the occurrence in which she lost her life. There is nothing on record to show that there was any enmity in between the appellant and the deceased for any matter. There is nothing on record to show that the act done by the appellant was the result of any pre-meditation. The evidence shows that whatever was done , it was in the heat of the passion, due to sudden quarrel. Counsel for the appellant has accordingly made a submission that it is not a case in which conviction should have been u/S 302 of the Indian Penal Code rather it is a case in which the act of the appellant

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falls within the purview of culpable homicide not amounting to murder, as it comes within exception 4 of Section 300 of the Indian Penal Code. The conviction at best in such case should have been u/S 304 part II of the Indian Penal Code.

Mr. Lala Kailash Bihari Prasad appearing on behalf of the state has vehemently argued in support of the trial court judgment and the sentence of death awarded to the appellant. His submission is that it is extremely brutal murder of a helpless woman whose two daughters have become orphan after death of her mother as their father has already deserted them. The intention of the appellant can be inferred from the weapon used, nature of injury and number of assault as well as part of the body where injury was caused. In the present case, the appellant assaulted with a knife near the chest and abdomen of the deceased repeatedly for five times unless she died. The circumstances and the evidence show that the appellant had both knowledge and intention of killing the deceased. Since the act of the appellant is brutal, it cannot be brought into any exception u/S 300 of the Indian Penal Code. The act of appellant can very well be placed in the category of a rarest of the rare case for which severest punishment like death sentence will only satisfy the cause.

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Mr. Ashutosh Kumar, counsel for the appellant, on the other hand, has submitted that the manner of occurrence as indicated in the scanty, fragile and discrepant evidence brought on record by prosecution show that there is no evidence to prove charge u/S 302 of the Indian Penal Code. The occurrence was unintentional

committed in the heat of passion. Such an act by no stretch of imagination can be termed as brutal and cold blooded murder for which ultimate and maximum sentence could be imposed. Counsel for the appellant referred a decision of Apex Court reported in **AIR 2007, Supreme Court, page 2531** wherein *growing demand of international Fora and second optional Protocol of international covenant on Civil and Political rights and Protocol to the American Constitution on Human Rights, has been taken into consideration, advocating abolition of death penalty."*

In **Bachchan Singh Vs State of Punjab, 1980 Vol. II, S.C.C. 684,** the Constitution Bench while dealing with the validity of death sentence formulated rule of the rarest of rare case which was reiterated in **Machchi Singh Vs State of Punjab , 1983, Vol. III, S.C.C. 470.** Circumstances which was laid down in the aforementioned cases were ;

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(i) *When the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community.*

(ii) *When the murder is committed for a motive which evinces total depravity and meanness; e.g. murder by hired assassin for money or reward; or cold-blooded murder for gains of a person vis-à-vis whom the murderer is in a dominating position or in a position of trust; or murder*

is committed in the course of betrayal of the motherland.

(iii) *When murder of a member of a Scheduled Caste or minority community, etc. is committed not for personal reasons but in circumstances which arouse social wrath; or in cases of "bride-burning" or "dowry-deaths" or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.*

(iv) *When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.*

(v) *When the victim of murder is an innocent child, or a helpless woman or old or infirm person or a person vis-à-vis whom the murderer is in a dominating position, or a public figure generally loved and respected by the community.*

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In the present case, it is true that the victim was a woman who is said to have been assaulted by the appellant due to which she died. But it is also obvious from the evidence that on the point of assault, there is solitary evidence of daughter of the deceased who has been examined as P.W. 12. She is a minor witness and her evidence has not been corroborated by any other

witness. In this circumstance, it is not safe to award death sentence to the appellant.

However, on consideration of the evidence, we are of the view that present case comes within the purview of exception IV of section 300 and the proper section in which the appellant could have been tried and convicted is section 304 part-II of the Indian Penal Code. Accordingly, the conviction of the appellant u/S 302 of the Indian Penal Code and the death sentence awarded to the appellant under the said section are set aside. The appellant is convicted u/S 304 part-II of the Indian Penal Code and sentenced to undergo R.I. for seven years. To this extent, the conviction and the sentence passed against the appellant is modified. The appellant will remain in custody for the rest of the period besides the period already undergone.

In the result, the reference is answered in negative and the appeal filed by the appellant is dismissed.

(Mridula Mishra,J.)

(Syed Md. Mahfooz Alam,J.)

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Patna High Court,
Dated 12th day of November,
2008 **NAFR . AKV/**